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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

NO. 57

RAILROAD COMMISSION OF TEXAS, ET AL.,
Appellants

v.

HUMBLE OIL & REFINING CO.,
Appellee

REPLY BRIEF FOR APPELLANTS

On Appeal from the United States District Court
for the Western District of Texas

FIRM FOUNDATION—AUSTIN

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SUBJECT INDEX

Page

1. Modification of Proration Orders Since the Trial of this Case 2-6
2. Alleged Distinctions Between this Case and the First Rowan & Nichols case 6-8
3. Nature of the Evidence 8-10
4. Property Rights Asserted by the Humble 10-15
5. Extent of Judicial Review Under Texas Statutes According to Texas Decisions 15-24

Conclusion 24

Acknowledgment of Service of Reply Brief 24

LIST OF CASES

Brown v. Humble Oil & Refining Co., 126 Tex. 296 ..... 11, 12, 13, 20

Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 73 (1939) 13, 18

Gulf Land Co. v. Atlantic Refining Co., 113 F. (2d) 902 22

Humble Oil & Refining Co. v. Turnbow, 133 S. W. (2d) 191 (Tex. Civ. App.); 61 S. Ct. 10 ..... 21, 22

LIST OF CASES—Continued

Page

Railroad Commission v. Houston Chamber of Commerce, 124 Tex. 375 21

Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 (on rehearing, 61 S Ct. 66) 2, 5, 7, 9, 10, 11

Railroad Commission of Texas v. Rowan & Nichols Oil Co., 107 F. (2d) 70 9

Rowan & Nichols Oil Co. v. Railroad Commission, 28 F. Supp. 131 ..... 2, 9

Shupee v. Railroad Commission of Texas, 123 Tex. 521, 73 S. W. (2d) 505 23

South Carolina State Highway Department v. Barnwell Bros., Inc., 303 U. S. 177 10

Texas Liquor Control Board v. Lanza, 129 S. W. (2d) 1153 (Tex. Civ. App.) 23

United Gas Public Service Co. v. State, 89 S. W. (2d) 1094 (Tex. Civ. App.); 303 U. S. 123 23

STATUTE

Revised Civil Statutes of Texas, 1925, Article 6049c, Section 8 17

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In this reply brief we shall confine ourselves to a discussion of points raised by Humble Oil & Refining Company in its brief, and relating to (1) modifications of the proration orders by the Railroad Commission since the trial of this case, and (2) questions raised by reason of the modification of its opinion by this court, on October 21, 1940, in *Railroad Com-*

mission of Texas v. *Rowan & Nichols Oil Company*,[1] which modification was made after the filing of our original brief in this case.

1. Modification of Proration Orders Since the Trial of this Case

Reference is made by the Humble in its brief (at pages 12, 13, 97) to changes made by the Railroad Commission in its proration orders subsequent to the trial in this case. Humble states in its brief (page 13) that the orders now in effect are "substantially the same" as the orders in effect at the time of the trial and Humble does not contend that the appeal is moot. However, in order that the court may understand the nature of the changes made by the Railroad Commission, the following summary is given:

The per well potential method of proration had been in effect since April, 1933, (see Humble's brief, page 23) until it was stricken down by the United States District Court on June 14, 1939, in the first *Rowan & Nichols Oil Company* case.[2] The Railroad Commission was denied a stay of this injunction and was therefore forced to permit the Rowan & Nichols wells to produce in excess of the allowable, but the Commission attempted to enforce the order against the remaining operators in the field until its appeal in the *Rowan & Nichols* case could be determined. Nu-

[1] 61 S. Ct. 66.

[2] *Rowan & Nichols Oil Co.* v. *Railroad Commission*, 28 F. Supp. 131.

merous oil companies, including the Humble, promptly applied for increases in their allowables, and on the failure of the Railroad Commission to act immediately on such requests, the Humble on July 26, 1939, filed suit asking for interlocutory relief. (R. 1) Although a hearing before the Commission on the Humble's application had been called for August 16, 1939, the District Court on August 11, 1939, granted a temporary injunction permitting the Humble to produce a flat 44% increase in the allowable of each of its wells. (R. 40)

It was obvious that, because of the large number of wells owned by the Humble, the production by Humble under the injunction while other operators were limited by the Commission's order would produce great injustices and would probably lead to general disregard of the Commission's orders and chaotic conditions. The Commission on August 15, 1939, therefore, shut the entire field down for 15 days. (R. 241) On August 16, 1939, the Commission began the hearing on the Humble application, which continued for several days thereafter. On September 11, 1939, the Railroad Commission issued a new proration order, containing the following recitals: (Plaintiff's Exhibit 8, offered R. 138, copied R. 473)

"Whereas, The method of allocation of the allowable production of the East Texas Field has been recently attacked in the Courts and the Commisison has been restrained from enforcing the provisions of said Rule as it applies to certain properties in the East Texas Field, and

"Whereas, The Commission finds that it is necessary to revise the method of allocation and distribution of the allowable oil in the East Texas Field as has been enforced and applied and to amend Rule 23 of Division 3 of the Order of October 17, 1933, in order to conform to certain standards of distribution of the allowable crude oil production between the wells in the East Texas Field as indicated as being necessary by the Courts, . . . "

In accordance with what the Commission found to be the "standards of distribution" held to be necessary by the courts, the Commission increased the total field allowable to 690,000 barrels daily and added the factors of acreage, sand thickness and pressure. (Plaintiff's Exhibit 8, offered R. 138, copied R. 473) As is shown by the recitations in the order, the per well potential method was modified, not because the Railroad Commission thought that it was unfair, but because it was attempting to comply with rules laid down by the lower federal courts.

The Humble was not satisfied with the changes made by the Railroad Commission in its orders and attacked the orders of September 11, 1939, and September 29, 1939, by its supplemental complaint. (R. 41) On November 10, 1939, the three-judge District Court denied a temporary injunction against the new method of proration. (R. 69) On February 21, 1940, after a hearing on the merits, the District Court announced that it would enjoin the new method of proration, but intimated that in case of an appeal it might grant a stay. (R. 568) After hear-

ing on a motion for a stay, the final judgment entered on March 19, 1940, provided for a sixty-day stay (R. 573) which has been extended by this court pending the determination of this appeal.

On June 3, 1940, this court handed down the decision in *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, upholding the per well potential method of proration. The compulsion which had caused the Commission to abandon the per well potential method of proration in September, 1939, was therefore removed. Obviously, the safest course for the Commission to follow was to return to the method of proration which had been specifically held to be within its power to enforce. By the order of June 19, 1940, the Commission returned to the per well potential method of proration, and, as is pointed out in the Humble's brief (at pages 12, 13) has continued the same method of proration by subsequent orders.

The trial on the merits in February, 1940, related almost entirely to the method of proration then in effect, which was inaugurated by the order of September 11, 1939. For this reason, the facts as to the per well potential method were not fully developed, as they were in the first *Rowan & Nichols* case. The return to the per well potential method of proration by the order of June 19, 1940, however, is not regarded by the Humble as making the case moot, since the present orders are "substantially the same" as the orders in effect at the time of the trial. (Hum-

ble's brief, p. 13)[3] Appellants agree that the case is not moot. The essential objection to all of the proration orders is against the base 20-barrel per well allowable. Since this feature is contained in all of the orders, the return to the per well potential order by the Railroad Commission after the decision of this court in the first *Rowan & Nichols* case (310 U. S. 573) does not make the case moot, but merely emphasizes the fact that the decision in the first *Rowan & Nichols* case is controlling on the essential issues in this case.

2. Alleged Distinctions between this Case and the First Rowan & Nichols Case

Humble Oil & Refining Company attempts to avoid the controlling effect of the decision of this court in the first *Rowan & Nichols* case[4] by making certain alleged distinctions between that case and the case now before the court. (Humble's brief, pages 15-29) For the most part, these attempted distinctions resolve themselves into assertions that in the first *Rowan & Nichols* case this court completely misconceived the facts and the law.

As to the alleged misconceptions of the facts in the first *Rowan & Nichols* case (Humble's brief,

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[3]It is interesting to note that while the Humble regards the per well potential orders as being "more drastic" than the September, 1939, and January, 1940, orders (Humble's brief, p. 13) the Rowan & Nichols Oil Company regards the per well potential order as being more favorable than the September and January orders. See Rowan & Nichols Oil Company's brief in No. 218, October Term, 1940, at pages 12-20.

[4]*Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 310 U. S. 573.

pages 15-20) we believe that we need do no more than point out that these same arguments were repeatedly and ably presented in the petitions for rehearing in the *Rowan & Nichols* case, and overruled by this court.[5] The court in that case correctly conceived the situation as involving a distribution where about 19,000 low capacity wells received a flat 20-barrel allowable or all they could produce up to that amount, and the remaining 6,000 wells produced on the basis of 2.32% of their hourly potential. The "statutory marginal" wells, then as now, were only about 500 in number, and their production was a very small part of the total allowable. The Commission, then as now, refused to cut better wells below the "marginal allowable" of 20 barrels per well, even though the "marginal well statute" (Article 6049b, Vernon's Texas Civil Statutes) applies specifically only to pumping wells incapable of making more than 20 barrels per day. The result was, as this court said, that the distribution resulted in "a flat per well allowance" to most of the wells in the field, which this court held to be "not an unnatural answer to the problem."[6]

The alleged misconception of the property law of Texas by this court in the *Rowan & Nichols* case (Humble's brief, pages 20-21) is discussed *infra*, pp. 10-15)

We believe that the reading of the references cited

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[5] 61 S. Ct. 66.

[6] See *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 583.

in the Humble's brief, pages 21-25, including the article by Mr. Hardwicke, one of Humble's attorneys, will convince the court more strongly than ever that in truth the lower federal courts have been too ready to interfere with and dictate to the Railroad Commission in its endeavors to work out a satisfactory formula for the East Texas field.

As to the substitution by the District Court of its judgment for that of the Railroad Commission, we need only point out that the temporary injunction of August 11, 1940, fixed an exact figure which the Commission was required to allow to each of the Humble's wells (R. 40) and that in its findings and conclusions after the trial on the merits the District Court measured the Humble's right solely by the standard of whether it was allowed to recover in proportion to its current reserves. (R. 578, 583, 585)

The inaccuracy of calculation of reserves, (Humble's brief, pages 26-27) and the granting of permits to drill on small tracts (Humble's brief, pages 27-28) have already been covered in our original brief. (Appellants' brief, pages 68-69, 61-66)

The alleged undisputed character of the evidence is discussed in the following section of this brief.

3. Nature of the Evidence

With respect to the evidence supporting the Railroad Commission's orders as being reasonably nec-

essary to prevent waste and to protect the correlative rights of all owners in the field, we gave a detailed analysis in our original brief, showing, we believe, that the Commission's orders are reasonable and specifically that the Humble has not been and will not be injured by their application. Apparently the Humble feels that by repeating continually that the evidence was "undisputed" (Humble's brief, pages 29, 40, 46, 53, 57) and that injury to the Humble was "practically admitted," (Humble's brief, pages 16, 46, 48, 96), it can lead the court to accept its assertions as true. An examination of the record will show that on all material points, there were at least serious disputes in the evidence. As to the injury to the Humble, we have already shown in our original brief that certainly there has been no actual injury to the Humble up to the present time (Appellants' brief, pages 38-44) and that as nearly as experts can predict, there will be no injury to the Humble in the future. (Appellants' brief, pages 45-49)

The fact that the District Court's findings and conclusions assert that "there really is little or no dispute in the evidence" (R. 587) does not make the assertion incontestable. The District Court in this case was obviously attempting to bolster its judgment, as were the District Court[7] and the Circuit Court of Appeals[8] in making similar assertions in their opinions in the first *Rowan & Nichols* case.

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[7]See *Rowan & Nichols Oil Co.* v. *Railroad Commission of Texas*, 28 F. Supp. 131, 134, 136

[8]See *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 107 F. (2d) 70, 72

This court in that case[9], followed the rule laid down in *South Carolina State Highway Department* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 191, that the court will examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the administrative action is without rational basis. Following the same rule in this case, the court will inevitably be led, we submit, to the conclusion that the orders of the Railroad Commission were erroneously stricken down by the three-judge District Court.

4. Property Rights Asserted by the Humble

While the Humble says that it does not insist upon any particular plan of proration (Humble's brief, pages 4, 12) it nevertheless repeatedly asserts that any method of proration will be invalid "unless its (the Humble's) current allowable is substantially in proportion to its percentage of the oil in place in the field." (Humble's brief, p. 47. See also pages 36, 97, 116) And the Humble also makes it plain that it claims that, as a matter of law, it is entitled to produce not merely the amount of oil *originally* in place beneath its leases, but that as each proration order is issued, the Railroad Commission must readjust the allowables to *current* oil in place, and thereby give the Humble the benefit of oil drained to it. (Humble's brief, footnote No. 8, p. 30; p. 43)

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[9]See *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 310 U. S. 573, 593

There is no support in any Texas cases for the Humble's assertions. This court was certainly correct in pointing out in the first *Rowan & Nichols* case[10] that the "rule of capture" is as much a part of the property law of oil and gas in Texas as the rule of ownership in place. This was the explicit holding of the Supreme Court of Texas in *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 305:

> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with *the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. . .*" (Our emphasis)

In *Brown* v. *Humble Oil & Refining Company, supra,* the court also points out that *both* the rule of ownership in place and the rule of capture "are subject to regulation under the police power of a state."[11]

The effect of regulation is necessarily to change the measure of the amount of oil which can be produced from a lease. Under unregulated flow, the amount of production would be measured principally by the diligence exercised by each operator in drilling and producing wells on his lease as compared with the diligence of surrounding operators. While for certain purposes (such as taxation) the rule

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[10] See *Railroad Commission of Texas* v. *Rowan & Nichols Oil Company*, 310 U. S. 573, 579.

[11] 126 Tex. at p. 305

of property is the rule of ownership in place, the rule of property for *production* is the rule of capture. The only way of determining how much oil a lease would produce under unregulated flow would be to actually produce it, together with all of the other leases in the field, in this way. Obviously, it would be impossible to carry over to regulated production the same standard of measuring production. It would be wholly impossible to guess how much oil would have been produced under unregulated flow, because it would be purely a matter of speculation as to how many wells would have been drilled on each tract, how fast they would have been produced, and what effect such production would have had on surrounding leases.

The effect of regulation in the East Texas field has unquestionably been to increase the total production from the field. (R. 183, 298, 340) The question, therefore, is as to the proper distribution of oil that would have been produced even under unregulated conditions, and also *oil that would not have been produced at all except for the regulations promulgated and enforced by the Railroad Commission.*

The Texas courts have never laid down hard and fast rules for the allocation of production under regulated flow. The farthest that any Texas court has gone is the statement made by the Supreme Court in *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 312, that the Railroad Commission should adjust the allowables so as to give the owner of a small tract "only his just proportion of the oil and gas" and

that, "By this method, each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land."

After the foregoing opinion was announced by the Supreme Court of Texas on June 12, 1935, the Railroad Commission by recitals in its order of August 26, 1935, (Defendants' Exhibit No. 16, offered R. 460, copied R. 554) found that the assumptions which were made by the Supreme Court in its opinion were contrary to the evidence of experts at numerous hearings before the Railroad Commission.

Thereafter, on November 27, 1935, the Supreme Court of Texas, on motion for rehearing, repudiated the suggestions that it had undertaken to prescribe "rules and standards by which to determine property rights and as standards to control the Railroad Commission in promulgating conservation rules and orders relating to oil and gas." (126 Tex. at p. 315) Specifically, it repudiated the suggestion that proration based on acreage was required. It recognized that there are many "factors, facts and circumstances" that must be considered in each case, that "all questions of fact are primarily for the Commission to determine" and that its orders will not be set aside "unless they are clearly illegal, unreasonable, or arbitrary." (126 Tex. at p. 316)

The only other expression in the Texas courts is the recent statement in *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 71:

> "It is the law that every owner or lessee of land is entitled to recover the oil and gas in or under his land, or their equivalents in kind."

Nothing in the foregoing decisions indicates that the Railroad Commission must adjust the allowable to be in proportion to current reserves under a lease. It is obvious of course that such a system would be extremely favorable to operators like the Humble whose "leases are situated along a line running in a northerly and southerly direction near the middle of the field; that is to say, in the main, its leases are located in the so-called 'fairway', or that portion of the field where the producing sands have the greatest thickness and the largest quantity of recoverable oil in place."[12] If the Humble and other operators similarly situated can produce currently in proportion to their reserves and also much longer than leases in less favored portions of the field, they obviously will produce much more than their oil in place (R. 295, 352, 353, 354, 399) and therefore much more than they are entitled to produce under any Texas decision.

Since Humble's leases have not been depleted in excess of the oil produced therefrom (See Appellant's brief, pages 38-44), since they will ultimately recover the equivalent of the oil originally in place beneath such leases (See Appellant's brief, pages 45-49), the Railroad Commission has adopted a reasonable method of allocation—one certainly not in

[12]Humble's complaint, R. 3. Statements that Humble's properties are not located mainly in the fairway in the Humble's brief are contrary to its own pleadings and the evidence of all witnesses. Compare the finding of the District Court in the identical language quoted above. R. 577

conflict with any Texas rule of property. Of course, the Railroad Commission retains the power of continuous supervision for relief of any inequalities or injustices that may arise in the future.

5. Extent of Judicial Review under Texas Statutes According to Texas Decisions

The Humble in its brief (pages 74-85) asserts that "the test of whether an order is reasonable under the Texas statute is different from the test of whether it is confiscatory and discriminatory, in violation of the Fourteenth Amendment" and that the burden on the party attacking such an order "is no more than that which exists in an ordinary suit between private persons." From these assertions, it concludes that the findings of the District Court should be upheld "if supported by substantial evidence."

We disagree with Humble both in its assertions as to the Texas law and the effect of such law upon the decision of this case.

Even if it were true (which we deny) that a different test would be applied under the Texas statutes by the Texas courts in determining whether the order is valid, this court has held that it will go no further in passing upon the validity of the order under the Texas statutes than it would go in determining its validity under the Fourteenth Amendment. In the amendment to its opinion filed on October 21, 1940, this court said:

"While the presence of a federal question may also open up state issues, *Siler* v. *Louisville & N. R. R.*, 213 U. S. 175, the claim here founded on Texas law is derived from a statute requiring proration on a 'reasonable basis.' Vernon's Texas Annotated Civil Statutes (1925) Art. 6049c, § 7. The Texas decisions, in so far as they have been brought to our attention, do not make clear whether the local courts may exercise an independent judgment on what is 'reasonable.' Compare *Brown* v. *Humble Oil & Refining Co.*, 126 Tex. 296, 316. But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. *What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute.* Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by the denial on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts." (Our emphasis)

It is quite evident that the Humble is trying to induce this court to attempt to do under the guise of enforcing a state statute what it has held that it will not do when the Due Process Clause is invoked. This court has expressly held in the *Rowan & Nichols* case, quoted above, that it will not allow the federal courts to be used for this purpose.

However, we believe that a reading of the Texas

cases makes it plain that an attack upon an order of the Railroad Commission is not an ordinary civil case, and that the burden upon the plaintiff is to show in effect that there is no substantial evidence affording a rational basis for the Railroad Commission's order.

The Texas statute allowing appeals from orders of the Railroad Commission in oil and gas cases, Article 6049c, Section 8, provides:

> "Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commisison thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of said laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

This statute applies to appeals from all orders of the Railroad Commission relating to oil and gas, no

distinction being made between orders granting drilling permits, proration orders, or any other kind of order relating to oil and gas.

The leading case applying to appeals to the courts from oil and gas orders of the Railroad Commission is *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73 (1939) containing a very careful analysis of the law by Judge Critz of the Supreme Court. After quoting from Article 6049c, Section 8, Revised Civil Statutes, Judge Critz says:

(134 Tex. at pages 73, 74)

"As already noted, our oil and gas conservation statutes provide an appeal from the Commission to the District Court of Travis County, Texas. The action before us here is such an appeal. In ordinary civil actions the district court, or any other trial court, exercises original jurisdiction to find and determine all fact questions, as well as all law questions. *The action provided by statute for an appeal to a district court of Travis County to review the rules and orders of the Commission is clearly not an ordinary civil action.* To the contrary, it is a special statutory action to enforce a right which exists only by statute, and not under the Constitution or at common law. Alpha Petroleum Co. v. Terrell, 122 Texas 257, 59 S. W. (2d) 364 Id. 372. It is the undoubted intention of the statutes under discussion to clothe the district court with all of its constitutional and statutory jurisdiction in passing on all questions of law which arise in the appeal from the Commission to such court. We encounter no difficulty in reading this conclu-

sion. The duty of defining the jurisdiction of the court to hear and determine fact questions under our oil and gas conservation statutes has given us very grave concern.

". . .

"As already indicated, we hold that the appeal provided by Section 8 of Article 6049c, supra, contemplates that the district court shall exercise its general jurisdiction in determining or deciding all questions of law arising under such action. *We think, however, that, generally speaking, the law contemplates that the Commission shall be left free to finally determine controverted issues of fact. . . .*

". . . . To our minds, the law contemplates that the fact findings made by the Commission in passing upon such applications are subject to review and correction by the courts only to the limited extent hereinafter stated. The court, on appeal from the Commission's order, should not set aside an order of the Commission either granting or refusing to grant a well permit unless such order is illegal, unreasonable, or arbitrary. *In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence.* Stated in another way, *the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the facts is reasonably supported by substantial evidence.* 34 Tex. Jur., p. 712, sec. 11, and authorities there cited. To permit the court to substitute its fact findings

on controverted issues of fact in such instances would add nothing of value to the administration of the law or the rule under discussion, but, to the contrary, would destroy all uniformity of Commission administration thereunder. . . . ." (Our emphasis)

Instead of being an "ill considered dictum" as is stated in the Humble brief (footnote No. 22, p. 83), the opinion of the Supreme Court of Texas, quoted above, is its deliberate and careful analysis of a problem which gave it "grave concern," and was evidently intended as a definitive statement upon a point which constantly arises in the Texas courts.

The decision of the Supreme Court of Texas in the *Gulf Land Company* case, supra, is in line with what was said by the same court in *Brown* v. *Humble Oil & Refining Company*, 126 Tex. 296, 83 S. W. (2d) 935, 87 S. W. (2d) 1069:

(126 Tex. at page 316)

". . . All questions of fact are primarily for the Commission to determine.

". . . The duty is lodged with the Railroad Commission to make rules to carry out the mandates of the Legislature, and to impartially enforce them. In the exercise of its power to grant exceptions to its rules, it is the duty of the Commission to treat all interested parties justly, fairly, and impartially under all the facts and circumstances of the case; *and the actions and rulings of the Commission in attempting to ac-*

> *complish such results will not be disturbed by the courts, unless they are clearly illegal, unreasonable, or arbitrary.* All rules and rulings of the Railroad Commission are presumed to be valid until the contrary is made to appear. . . . " (Our emphasis)

It is noteworthy that both of the foregoing cases were decided by the Supreme Court after the decision under the railroad rate statute cited by the Humble, *Railroad Commission of Texas* v. *Houston Chamber of Commerce*, 124 Tex. 375. In view of this fact, it is extremely doubtful if the *Houston Chamber of Commerce* case, which was an opinion of the Commission of Appeals, would now be followed, even in railroad rate cases. At any rate, it is perfectly clear from the more recent decisions of the Supreme Court of Texas that appeals from orders of the Railroad Commission in oil and gas cases are not ordinary civil cases, and that orders of the Railroad Commission in such cases will not be set aside where there is substantial evidence to support them.

A still more recent decision sustaining the same view is *Humble Oil & Refining Co.* v. *Turnbow*, 133 S. W. (2d) 191 (Tex. Civ. App.). In this case, the District Court sustained the order of the Railroad Commission where the record of the hearing before the Railroad Commission showed that it acted upon substantial evidence. Judgment was granted at the close of the plaintiff's evidence, although no testimony was offered except the record of the Railroad Commission's hearing and expert testimony contra-

dicting the evidence heard by the Commission. The Court of Civil Appeals affirmed the judgment of the trial court and the Supreme Court of Texas on January 3, 1940, approved the opinion and judgment of the Court of Civil Appeals by refusing application for writ of error. Humble then filed with this court a petition for certiorari, *mainly on the ground that it had been denied an independent determination of the facts by the Texas courts* and therefore had been denied due process under the Fourteenth Amendment. This court denied petition for certiorari on October 14, 1940. *Humble Oil & Refining Co.* v. *Turnbow*, 61 S. Ct. 10.

The settled Texas law is correctly stated by Judge Hutcheson in *Gulf Land Co.* v. *Atlantic Refining Co.*, 113 F. (2d) 902, 904 (5th Cir., 1940) as follows:

> ". . . Under the settled law of Texas as carefully laid down in Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S. W. (2d) 73, and in later cases citing it, it is beyond question that the commission is primarily charged with the duty of, and vested with a wide discretion in, determining whether a permit should be granted. *It is equally beyond question that in the special statutory action, to set the order aside, provided by Article 6049c, unless it appears that its finding and order is unsupported by substantial evidence, the order must stand.* For the court may not substitute its judgment or opin-

ion for that of the commission. . . " (Our emphasis)[13]

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[13]Under similar statutes, the Texas courts have laid down substantially the same rule in the following instances:

Permits under Motor Carrier Laws:

Shupee v. *Railroad Commission of Texas*, 123 Tex. 521, 73 S. W. (2d) 505:

(73 S. W. (2d) at page 508)

"We think it clear that the intention of the statutory provisions is that the decisions of the Railroad Commission upon the granting or refusing of any permit to operate a bus line over any highways in Texas should be final and conclusive, unless it acted unreasonably and unlawfully, or unless its decisions had no basis in fact and were arbitrary or capricious. *In other words, if the findings and orders of the Railroad Commission in such matters had any reasonable basis in fact, and were not shown to be arbitrary and unreasonable, they must be supported by the court.* The court cannot substitute its judgment for that of the commission, unless it be shown that said judgment of the commission was without foundation in fact, or was unreasonable or arbitrary. . . ." (Our emphasis).

Rate Orders for Gas Utilities:

United Gas Public Service Co. v. *State*, 89 S. W. (2d) 1094, 1102 (Tex. Civ. App.):

" . . . That the complaining party attacking a rate as being unreasonable and unjust must allege facts which, if proved, would show the rate to be unjust and unreasonable as a matter of law, and to prove by clear and satisfactory evidence *'which leaves no reasonable doubt in the judicial mind that the rate or rule is unjust and unreasonable.'* R. R. Comm. v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S. W. 573, 580; R. R. Comm. v. Weld & Neville, 96 Tex. 394, 409, 73 S. W. 529." (Our emphasis)

The opinion of the Court of Civil Appeals was approved by the Supreme Court of Texas, which refused writ of error. This court on appeal affirmed the judgment of the Court of Civil Appeals. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123.

Permits under Liquor Laws:

Texas Liquor Control Board v. *Lanza*, 129 S. W. (2d) 1153, 1154, (Tex. Civ. App.; application for writ of error dismissed by Texas Supreme Court with notation, "Correct Judgment.")

" . . . The settled rule, stated conversely, is that, orders or findings of fact of a regulatory body or commission, are not reviewable on appeal unless they are unsupported by evidence; Humble Oil & Refining Co. v. Railroad Commission, et al., Tex. Civ. App., 112 S. W. 2d 222. . . . "

CONCLUSION

For the reasons stated, it is respectfully prayed that the judgment of the three-judge District Court be reversed.

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Service of the foregoing reply brief is acknowledged this ..... day of December, 1940.

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